1989

State of Utah v. George Oliver Dumas : Brief of Appellant

Utah Court of Appeals

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890643

IN THE UTAH COURT OF APPEALS

STATE OF UTAH,	)	
	)	
Plaintiff/Respondent,	)	
	)	
VS.	)	
	)	
	)	CASE NO. 890643-CA
GEORGE OLIVER DUMAS,	)	PRIORITY NO. 2
	)	
Appellant/Defendant.	)	

APPELLANT'S BRIEF

APPEAL FROM THE THIRD JUDICIAL DISTRICT COURT, SUMMIT COUNTY

THE HONORABLE TIMOTHY R. HANSON PRESIDING

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATUTES CITED

CASES CITED

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STATE OF UTAH,	)	
	)	
Plaintiff/Respondent,	)	
	)	
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APPELLANT'S BRIEF

JURISDICTION OF THE COURT

This Court has jurisdiction over this appeal pursuant to U.C.A., section 78-2a-3(2)(j).

NATURE OF THE PROCEEDINGS

This is an appeal from the Defendant's four convictions, pursuant to a bench trial before the Honorable Timothy R. Hanson sitting in Summit County, Utah, stemming from a four count information (Count I: Theft by Receiving, U.C.A, section 76-6-408; Count II: Theft by Receiving, U.C.A., section 76-6-408; Count III: Theft by Receiving, U.C.A., section 76-6-408, and; Count IV: Habitual Criminal, U.C.A., section 76-8-1001).

STATEMENT OF THE ISSUES PRESENTED ON APPEAL

1. Did the Court err by convicting the Defendant under two separate counts of Theft by Receiving (Count I: as to the 1972 GMC and Count II: as to the snowmobile) when both items were stolen in a single criminal episode from the same individual.

2. Did the Court err by convicting the Defendant of Theft by Receiving, pursuant to Counts I, II, and III, where each of these

Counts in the information fails to delineate whether the Defendant was being charged with Theft by Receiving or Theft by Concealing.

3. Did the Court err by convicting Defendant under Count I: Theft by Receiving, U.C.A, section 76-6-408; Count II: Theft by Receiving, U.C.A., section 76-6-408; Count III: Theft by Receiving, U.C.A., section 76-6-408 based upon insufficient evidence.

4. Did the Court err by convicting the Defendant under Count IV (Habitual Criminal) when one of the previous underlying felonies was committed prior to the enactment of the Habitual Criminal Statute (U.C.A. 76-8-1001).

STATEMENT OF THE CASE

Defendant was charged in a four count information with Count I: Theft by Receiving, U.C.A, section 76-6-408; Count II: Theft by Receiving, U.C.A., section 76-6-408; Count III: Theft by Receiving, U.C.A., section 76-6-408, and; Count IV: Habitual Criminal, U.C.A., section 76-8-1001.

Based upon an anonymous tip regarding the operation of a "chop shop," conveyed to Salt Lake County Sheriff Pete Hayward, Salt Lake County Sheriff's Detective Gaylord Dent and four other members of the Automobile Theft Squad went to Wills Auto Repair in Oakley, Utah on February 16, 1989. Upon arrival on the scene the officers observed several vehicles on the premises outside the building. Of the several vehicles observed, one, a 1972 GMC, matched the description of a vehicle recently stolen in Salt Lake City from a Larry Anderson. Detective Dent went to the vehicle, obtained a vehicle identification number, and confirmed that the vehicle had been stolen from Larry Anderson in Salt Lake City. The officers found no individuals on the

premises at this time and left stolen vehicle on the premises. The officers then proceeded to the residence of Art Wilkinson in Samak, Utah where they observed a Yamaha snowmobile which had also been reported stolen from Larry Anderson in Salt Lake City. The officers found no one at the Wilkinson residence or on the premises and left the snowmobile on the premises and returned to Salt Lake County. Both the 1972 GMC and the Yamaha snowmobile belonged to Larry Anderson and had been reported by him as stolen on or about February 16, 1989 from the parking lot of a Fred Meyer store in Salt Lake City.

Detective Dent then proceeded to conduct a "stake-out" of the premises known as Wills Auto Repair in Oakley, Utah. The "stake-out" was conducted on February 16, 20, 21, 22, 23, 24, 25, 26, and 27, 1989. On these occasions Detective Dent conducted surveillance of the premises at various times, however, mostly at night. During the surveillance, Detective Dent noticed numerous individuals leave and enter the building freely. Detective Dent observed that the stolen 1972 GMC vehicle had been moved into the middle bay of the garage but did not see anyone move the vehicle. On two occasions during the surveillance (February 16 and February 23) Detective Dent was accompanied by Detective Harold Steffee. During the surveillance the officers observed the following:

A. Many individuals enter and leave the premises freely at all times of the night;

B. Many individuals driving vehicles up to the premises, however, the officers never ran checks on the vehicles nor license plates they observed;

C. Defendant was observed on the premises only once during the surveillance on February 23, 1989 and that was merely by an open garage bay door while several other individuals were also on the premises;

D. The officers never saw anyone operating any of the vehicles nor working on any of the vehicles;

E. On or about February 28, 1989 when Detective Dent conducted his surveillance he observed the stolen snowmobile (previously observed on 2/16/89 at Art Wilkinson's residence in Samak, Utah) on the premises at Wills Auto, some 25 feet from the building;

F. During the surveillance Detective Dent never observed anyone near the snowmobile;

G. On or about February 25, 1989 when Detective Dent conducted his surveillance he observed a U-Haul transport trailer (later determined to be stolen) on the premises at Wills Auto, some 25 feet from the building;

H. During the surveillance Detective Dent never observed anyone near the U-Haul trailer;

On February 28, 1989 Detective Dent and members of the Salt Lake County Sheriff's Office, in conjunction with members of the Summit County Sheriff's Office executed a search warrant on the premises in Oakley, Utah (Wills Auto). The warrant was executed at about 9 A.M. in the morning, the officers were readily able to enter the building and, upon entry found the Defendant and his wife in the building.

Based upon these events, Defendant was charged under the four count information. (R91 pg. 19, l.1 to pg. 94, l.3)

Defendant, pursuant to a bench trial before the Honorable

Timothy R. Hanson, was convicted on all four counts and it is from these convictions that Defendant now appeals.

SUMMARY OF ARGUMENTS

1. The Court erred by convicting and sentencing the Defendant under two separate counts of Theft by Receiving (Count I: as to the 1972 GMC and Count II: as to the snowmobile) when the items of property which were the res of the thefts were stolen in a single criminal episode from the same individual.

2. The Court erred by convicting and sentencing the Defendant under Count I: Theft by Receiving, U.C.A, section 76-6-408; Count II: Theft by Receiving, U.C.A., section 76-6-408; and Count III: Theft by Receiving, U.C.A., section 76-6-408 where none of the Counts properly delineated a crime, to wit: either Theft by Receiving or Theft by Concealing, but merely recited the statutory language of U.C.A., section 76-6-408.

3. The Court erred by convicting Defendant under Count I: Theft by Receiving, U.C.A, section 76-6-408; Count II: Theft by Receiving, U.C.A., section 76-6-408; Count III: Theft by Receiving, U.C.A., section 76-6-408 based upon insufficient evidence, to wit: State proved no more than Defendant's mere proximity to stolen property or Defendant's presence near property or premises and failed to prove Defendant's dominion and control over property or premises.

4. The Court erred by convicting the Defendant under Count IV (Habitual Criminal) when one of the previous underlying felonies was committed prior to the enactment of the Habitual Criminal Statute (U.C.A. 76-8-1001) and thus makes such an application of the Statute an ex post facto law.

ARGUMENTS

POINT I

DID THE COURT ERR BY CONVICTING THE DEFENDANT UNDER TWO SEPARATE COUNTS OF THEFT BY RECEIVING (COUNT I: AS TO THE 1972 GMC AND COUNT II: AS TO THE SNOWMOBILE) WHEN BOTH ITEMS WERE STOLEN IN A SINGLE CRIMINAL EPISODE FROM THE SAME INDIVIDUAL.

Count I of the Information under which Defendant was charged, which was amended at trial (R92 pg. 3-5, l. 21) charged the Defendant with Theft by Receiving, U.C.A, section 76-6-408, to wit: an operable motor vehicle of Larry Andersen or, in the alternative, property exceeding one thousand dollars in value. Count II of the Information under which Defendant was charged, charged the Defendant with Theft by Receiving, U.C.A, section 76-6-408, to wit: property belonging to Larry Anderson valued at more than $250.00 but less than $1,000.00.

It was clear from the trial testimony of Larry Anderson that both the property which formed the basis of Count I (the 1972 GMC Truck) and the property which formed the basis of Count II (the snowmobile) were taken at the same time during one criminal episode. (R91 pg. 121, l. 11-25) Due to the lack of evidence presented by the State during the trial, the State cannot separate the items stolen at the same time in one criminal episode and make each separate item the basis of separate criminal counts. (State v. Casias, 106 Utah Adv. Rep. 52; 1989)

The only permissible way that the State could have separated the items taken at the same time during one criminal episode and made each item the basis on a separate criminal count would be if the State proved at trial that the stolen items were not received by the

Defendant on one occasion. This principle was set forth in the case of State v. Bair, 671 P2d 203 (Utah, 1983) wherein the Court stated at page 206:

"If the evidence does not satisfy this condition, but instead shows that the stolen articles were all received on one occasion, then the converse of the foregoing rule is true, i.e., the receipt is considered a single offense and must be prosecuted as one crime....If the Defendant's receipt of the various stolen guns occurred on only one occasion, it definitely satisfied the 'closely related in time' requirement of the single criminal episode statute, as well as the 'single criminal objective' requirements thereof...." (citing: State v. Bell, 560 P2d 951 [N.M., 1977] and State v. Kuhnley, 242 P2d 843 [Az., 1952])

The Court in the BAIR case continued at page 207 (citing the case of State v. Clark, 497 P2d 1210 [Or., 1972]) by stating:

"If the State contended the articles were received or concealed by the Defendant on separate occasions, it was incumbent upon it to offer evidence to that effect."

In the case presently before the State failed to prove or offer any evidence that the articles in question were received by the Defendant on separate occasions.

It should also be noted that the information under which Defendant was charged and convicted alleges that each "receiving of stolen goods," delineated in Count I, Count II, and Count III occurred on the same day, to wit: February 28, 1989.

As such, the burden of proof for the State, as discussed above, becomes even more important and, as indicated by the trial record,

more conspicuous in its absence.

Therefore, the Court erred in permitting Defendant to be charged and convicted under Counts I and II.

As to Count III of the Information: Count III of the Information under which Defendant was charged and convicted, charged the Defendant with Theft by Receiving, U.C.A, section 76-6-408, to wit: property belonging to U-Haul exceeding $1,000.00 in value. For the reasons stated above Count III must likewise be stricken. Once again, as the Court stated in the BAIR case:

"Both the Plaintiff s argument and the trial court s ruling on the issue are based upon a false premise. They assume that the same evidence which shows that the various articles of stolen property were actually 'taken' on three separate occasions also serves as evidence that Defendant received these stolen articles on the same three occasions. This assumption is entirely misplaced. That proof of the date of the actual taking does not necessarily establish the date of receipt for purposes of the charge of receiving stolen property has been determined in previous cases."

Once again, the record is void of any evidence presented at trial which would establish not only that the Defendant received the property but which would establish that the Defendant received the property on more than one occasion.

POINT II

DID THE COURT ERR BY CONVICTING THE DEFENDANT OF THEFT BY RECEIVING, PURSUANT TO COUNTS I, II, AND III, WHERE EACH OF THESE COUNTS IN THE INFORMATION FAILS TO DELINEATE WHETHER THE DEFENDANT WAS BEING CHARGED WITH THEFT BY RECEIVING OR THEFT BY CONCEALING.

The wording of Counts I, II, and III of the information are

essentially identical charging that the Defendant "received, retained, disposed of, concealed, sold, or withheld..." the property of another.

The Defendant contends that the way Counts I, II, and III of the Information were worded, neither Count I, Count II, nor Count III charges the Defendant with an actionable crime. Defendant bases this argument on the case of State v. Ramon, 736 P2d 1059 (Utah App. 1987) wherein this very Appellate Court ruled that the crime of receiving stolen property is a separate and distinct crime from concealing stolen property. (See also: State v. Murphy, 617 P2d 339 [Utah, 1980]; State v. Lamm, 606 P2d 229 [Utah, 1980]; State v. Pappas, 705 P2d 1169 [Utah, 1985])

Since the wording of Counts I, II, and III of the Information do not adhere to the distinction made in the RAMON case and in conjunction with the wording found in Rule 9 of the Utah rules of Criminal Procedure (U.C.A. 77-35-9), the Information must be stricken as insufficient to charge a crime and the convictions rendered pursuant to Counts I, II, and III must be reversed.

POINT III

THE COURT ERRED BY CONVICTING DEFENDANT UNDER COUNT I: THEFT BY RECEIVING, U.C.A, SECTION 76-6-408; COUNT II: THEFT BY RECEIVING, U.C.A., SECTION 76-6-408; COUNT III: THEFT BY RECEIVING, U.C.A., SECTION 76-6-408 BASED UPON INSUFFICIENT EVIDENCE

Defendant now argues that his convictions, pursuant to Counts I, II, and III were based upon insufficient evidence.

A. As argued above under Point I, the record is void of any evidence presented by the State at trial which would establish that the Defendant received and/or concealed the property.

The evidence adduced at trial showed only that:

--The building known as Will's Auto had a "For Rent" sign in its window (R 91 pg. 42, l. 9-17)

--The building did not belong to the Defendant (R 91 pg. 36, l. 12-23; pg. 152, l.5-24)

--Many individuals were seen entering and exiting the building known as Will's Auto without use of a key or the doors being locked (R 91 pg.52, l.8 to pg. 53, l.7; pg. 54, l.4-17; pg. 55, l.4-24; pg. 56, l.11-23; pg. 103, l.9-14)

--Defendant was never seen in possession of the snowmobile; the snowmobile remained some 25-30 feet from the building Defendant was seen entering and exiting (R 91 pg. 68, l.20-25; pg. 69, l.3-5; pg. 83, l.19-22)

--The snowmobile was originally seen parked outside a house belonging to another individual (R 91 pg.46, l. 10 to pg. 47, l.2)

--The U-Haul items were brought to the parking lot of Will's Auto by another individual and remained lying on the ground some 25-30 feet from the building Defendant was seen exiting and entering (R91 pg. 68, l.12-23; pg. 69, l.3-5)

It was incumbent upon the State to prove at trial that the Defendant has either actual or constructive possession of the stolen items. At least as to the snowmobile and the U-Haul equipment, the record is void of any evidence that Defendant was in actual or constructive possession of the stolen items. At best, the record merely shows that these items were located in a parking lot near the road some 20-30 feet from the building in which Defendant was seen. "Mere proximity to stolen merchandise is not enough to establish

dominion or control over it. In addition, mere presence is insufficient to establish dominion and control over the premises where stolen property is found. (State v. Summers, 728 P2d 613 [Wash. App., 1986]; State v. Wilson, 544 So.2d 1300 [La.App. 4 Cir., 1989])

All the State showed at trial is that Defendant was in the proximity and/or presence of the stolen property and this standing by itself is not sufficient evidence upon which to base a conviction.

B. As argued above under Point I, the record is void of any evidence presented by the State at trial which would establish that the Defendant received and/or concealed the property on more than one occasion.

C. One cannot be convicted of theft by receiving when the actual physical possession of the stolen property had been recovered by law enforcement officers before delivery of the property to the accused. (State v. Sterling, 640 P2d 1264 [Kan., 1982])

Defendant asserts that when Detective Dent and the Salt Lake County Sheriff's Auto Theft Squad went up to Oakley, Utah on February 16, 1989 and located the stolen 1972 GMC and the Snowmobile, they effectively took possession of the items and from that point in time forward were the individuals who had possession of the stolen items and who were depriving the owner of their possession. (R91 pg. 43, l.8 to pg. 47, l. 22)

The officers allowed the stolen vehicles to remain on the premises at Will's Auto for some twelve (12) days before a search warrant was executed.

POINT IV

THE COURT ERR BY CONVICTING THE DEFENDANT UNDER COUNT IV (HABITUAL CRIMINAL) WHEN ONE OF THE PREVIOUS UNDERLYING FELONIES WAS COMMITTED PRIOR TO THE ENACTMENT OF THE HABITUAL CRIMINAL STATUTE (U.C.A. 76-8-1001)

The statute upon which Count IV of the Information is based, U.C.A., section 76-8-1001, was passed by the legislature on March 12, 1975 and had an effective date of May 13, 1975. One of the crimes upon which the Court relied in finding the Defendant guilty under Count IV (Habitual Criminal) was a felony which was committed before the effective date of the Habitual Criminal statute but for which Defendant was sentenced after the enactment date of the statute. Defendant argues that under this set of facts the Habitual Criminal statute, as applied to the Defendant in this case, acts as an ex post facto law in that it proscribes a punishment for crime the defendant committed prior to the enactment of the statute.

CONCLUSION

For the foregoing arguments, Defendant/Appellant requests that this Court:

1. Find that Defendant's convictions under all four (4) counts of the information be reversed.

2. For such other and further relief as the Court deems appropriate under the circumstances.

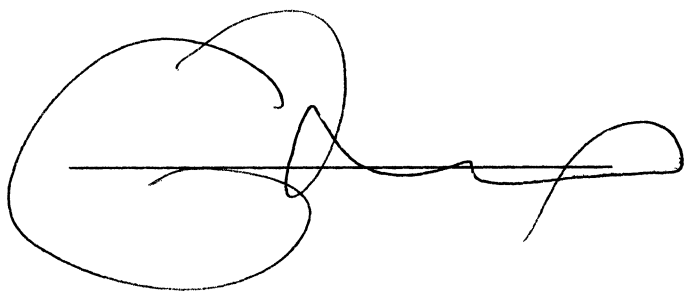
Dated this 29th day of November, 1989.

ELLIOTT LEVINE, Attorney
for Defendant/Appellant

CERTIFICATE OF MAILING

THE UNDERSIGNED certifies that they mailed a true and correct copy of the foregoing document, postage prepaid, on this 29th day of November, 1989, to:

ATTORNEY GENERAL, STATE OF UTAH
236 STATE CAPITOL
SALT LAKE CITY, UTAH 84114



ADDENDUM

A. That belonged to Mr. Dumas, as I indicated, the jacket was bearing the name Dumas. Other than that, they weren't more specifically idendified as belonging to him.

MR. LEVINE: Okay. I don't think I have any further questions, Your Honor. I'd ask -- well, the admission of Defendant's Exhibit 15 into evidence.

MR. REED: No objection.

THE COURT: Fifteen is received. Any redirect of this witness?

MR. REED: None, Your Honor.

THE COURT: Thank you, deputy, you may step down.

MR. REED: May this witness be excused?

MR. LEVINE: No objection.

THE COURT: You're excused as well.

MR. REED: State will call Larry Andersen, Your Honor.

THE COURT: Call Larry Andersen, please. If you'll come forward and be sworn, please, sir.

LARRY ANDERSEN

Called as witness in behalf of the plaintiff was sworn and testified as follows:

DIRECT EXAMINATION

By Mr. Reed:.

Q. Will you state your full name and spell your last name, please?

A. Larry Andersen.

Q. How is your last name spelled?

A. An E-N.

Q. Are you a resident of Salt Lake County?

A. Yes.

Q. Were you residing in Salt Lake County in February of 1989?

A. Yes.

Q. At any time in February 1989, did you have property stolen?

A. Uh huh (affirmative).

Q. And did you report that property stolen?

A. Yes.

Q. When did that occur?

A. I think it was on the 4th of February.

Q. What property was it that was taken at that time?

A. A truck, 1972 GMC, and a snowmobile.

Q. Were those items taken at the same time?

A. Uh huh (affirmative).

Q. From what location were they taken?

A. It was a parking lot in Fred Meyers in Salt Lake.

vehicle inside the garage, and observations of the Ski-Doo on the Monday night, which would have been the 27th.

Q. And that would have been over at Mr. Williams' place?

A. No, sir. The Ski-Doo was in front of the shop on the 27th.

Q. Okay. Let's get back to that. Up till the 27th, you never saw the Ski-Doo on the property; is that correct?

A. I don't recall having seen it there, no, sir.

Q. And at what point in time -- once again the 27th was the first time you noticed the U-Haul stuff?

A. That I recall -- oh, no, sir. No, sir. The U-Haul was seen there on the Saturday, the 25th, I believe.

Q. And you just noticed it there then; is that correct?

A. Yes.

Q. And once again, that was outside some twenty-five to thirty feet from the building?

A. Twenty to thirty feet.

Q. Twenty to thirty feet from the building. Ski-Doo likewise twenty to thirty feet from the building?

A. Yes, sir.

Q. Did you notice any tracks around there?

A. Other than track marks, no.

Q. You never saw any individuals go near those items at all?

A. Not when I was there, no.

Q. Let me have you come up to the drawing again, and maybe mark where these items were in relation to the building.

A. Okay..

Q. Ski-Doo, and -- maybe just put an S. and a circle for the Ski-Doo.

A. Okay. The front trailer, at that time this vehicle was no longer there.

Q. Okay.

A. That had been moved. The trailer was parked in that fashion, not quite that far out, somewhat in this fashion. The Ski-Doo I believe was here and that Road Runner was parked here.

Q. Okay. Once again, where is the Ski-Doo at?

A. Right here. It was either here or here. I don't recall if it was in front or back. With the photograph I could obviously identify it.

Q. And the Road Runner, was the Road Runner parked in the same place, or did that vehicle keep --

A. The Road Runner remained here when it had

been taken off of the trailer.

Q. Did you ever see it on the trailer?

A. Yes. On the 25th.

Q. On the 25th you saw it on the trailer?

A. Yes, I did.

Q. Did you run a license plate check on there?

A. There wasn't a license plate on the vehicle.

Q. So you saw it sitting out front on the trailer?

A. Yes, sir.

Q. And then after that you just saw it parked permanently in front there?

A. Uh huh (affirmative).

Q. Did you do any check on that to determine if that vehicle was stolen?

A. There was no way to check. There was no license plate, and I obviously couldn't approach the building.

Q. So you don't know if that was legitimately there or stolen?

A. At that time I did not.

Q. When did you first find out about this warrant being issued?

A. I'm sorry, which warrant?

Q. The warrant that was executed on the 28th?